OFFICE OF THE GENERAL COUNSEL Division of Operations-Management

MEMORANDUM OM 14-23

February 4, 2014

TO: All Regional Directors, Officers-in-Charge,

and Resident Officers

FROM: Anne Purcell, Associate General Counsel

SUBJECT: Casehandling Instructions for Cases in which the Section 9(a) Status of a

Collective-Bargaining Relationship in the Construction Industry is in Issue

Memorandum OM 04-83 (Sept. 2, 2004), which was issued in response to the D.C. Circuit's adverse *Nova Plumbing*¹ decision and subsequent EAJA litigation, provided casehandling instructions for situations in which charges are premised on a claim that contractual language in a collective-bargaining agreement in the construction industry created a Section 9(a) relationship pursuant to *Central Illinois Construction*. Whether a particular bargaining relationship in the construction industry has been formed under Section 8(f) or 9(a) can be significant for a variety of reasons. Please note that this memorandum supersedes OM 04-83.

Shortly after OM 04-83 was issued, the General Counsel adopted a position of urging the Board to reconsider the *Central Illinois* test and to adopt an alternative test regarding the role of contract language in establishing a Section 9(a) relationship in the construction industry.⁴ However, the Board has not to date addressed this alternative

¹ Nova Plumbing, Inc. v. NLRB, 330 F.3d 531 (D.C. Cir. 2003), denying enforcement of 336 NLRB 633 (2001).

² Central Illinois Construction (Staunton Fuel), 335 NLRB 717, 719 (2001) (holding that written contract language standing alone can establish Section 9(a) status in the construction industry if the language unequivocally shows (1) that the union requested recognition as the majority representative of the unit employees; (2) that the employer granted such recognition; and (3) that the employer's recognition was based on the union's showing, or offer to show, substantiation of its majority support).

³ For example, a representation petition may be processed during the term of a Section 8(f) collective-bargaining agreement but may be barred by a Section 9(a) agreement; at the end of the Section 8(f) bargaining agreement, the employer has no continuing obligation to bargain; in a Section 9(a) relationship, the union enjoys a rebuttable presumption of majority support after the termination of any collective bargaining agreement and the employer has a continuing duty to bargain. See Section 8(f) (second proviso); *John Deklewa & Sons*, 282 NLRB 1375, 1381-83, 1385-87 (1987), *enforced sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988); *Central Illinois Construction*, 335 NLRB at 718.

⁴ Lambard, Inc., Case 31-CA-27033 (July 7, 2005) (Significant Appeals Minute 05-13) (taking position that contract language that satisfies the *Central Illinois* test should create a rebuttable presumption of 9(a) status when challenged by an employer, while allowing for no such presumption when challenged by employees, and that the 10(b) limitation should not apply to such challenges).

test and has instead continued to apply *Central Illinois*. Further, the Board recently made clear in *King's Fire Protection*⁶ that, pursuant to *Central Illinois*, it will not require extrinsic evidence of a union's majority support where the parties' contractual language conclusively establishes a Section 9(a) relationship.

Accordingly, Regions should **not** affirmatively seek evidence of majority support where charges are premised on contractual language in a construction industry collective-bargaining agreement that creates a Section 9(a) relationship in accordance with *Central Illinois*. Nor should Regions affirmatively seek evidence that contradicts the contractual language.

However, there may be circumstances where, despite contractual language establishing Section 9(a) status, the Region is presented with direct evidence that the union did not actually have majority support at the time the employer extended Section 9(a) recognition to the union. In those cases, Regions should investigate whether the union had majority support and submit those cases to the Division of Advice.

If you have any questions regarding this memorandum, please contact your Assistant General Counsel or Deputy or the Division of Advice.

/s/ A.P.

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 $^{^{5}}$ See Austin Fire Equipment, LLC, 359 NLRB No. 3, slip op. at 1, n.5 (Sept. 28, 2012).

⁶ 358 NLRB No. 156, slip op. at 1, n.1 (Sept. 27, 2012).